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**CONFORMED COPY  
ORIGINAL FILED**  
Superior Court of California  
County of Los Angeles

**JUN 02 2014**

Sherri R. Carter, Executive Officer/Clerk  
By Myrna Beltran, Deputy

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF LOS ANGELES**

10 CONSUMER ADVOCACY GROUP, INC.,  
11 in the public interest,

12  
13 Plaintiff,

14 v.

15 SAVE MART SUPERMARKETS, INC.  
16 DBA FOOD MAXX, a California  
17 Corporation; J.B. DISTRIBUTION  
18 SERVICE, INC. a Texas Corporation;  
19 FUNSOURCE PARTNERS DBA  
FUNTASTIC CORP., a Texas Corporation;  
and DOES 1-20;

20 Defendants.  
21

CASE NO.

**BC547359**

COMPLAINT FOR PENALTY AND  
INJUNCTION

Violation of Proposition 65, the Safe  
Drinking Water and Toxic Enforcement  
Act of 1986 (*Health & Safety Code*, §  
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL  
CASE (exceeds \$25,000)

22  
23 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against  
24 defendants SAVE MART SUPERMARKETS, INC. DBA FOOD MAXX; J.B. DISTRIBUTION  
25 SERVICE, INC.; FUNSOURCE PARTNERS DBA FUNTASTIC CORP; and DOES 1-20 as  
26 follows:  
27  
28

\*An  
Association of  
Independent  
Law  
Corporations.

**THE PARTIES**

- 1  
2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an  
3 organization qualified to do business in the State of California. CAG is a person within  
4 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting  
5 as a private attorney general, brings this action in the public interest as defined under  
6 Health and Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant SAVE MART SUPERMARKETS, INC. DBA FOOD MAXX ("SAVE  
8 MART") is a California corporation, duly licensed under the laws of California and doing  
9 business in the State of California at all relevant times herein.
- 10 3. Defendant J.B. DISTRIBUTION SERVICE, INC. ("J.B.") is a Texas corporation, doing  
11 business in the State of California at all relevant times herein.
- 12 4. Defendant FUNSOURCE PARTNERS DBA FUNTASTIC CORP. ("FUNTASTIC") is a  
13 Texas corporation, doing business in the State of California at all relevant times herein.
- 14 5. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,  
15 and therefore sues these defendants by such fictitious names. Plaintiff will amend this  
16 complaint to allege their true names and capacities when ascertained. Plaintiff is  
17 informed, believes, and thereon alleges that each fictitiously named defendant is  
18 responsible in some manner for the occurrences herein alleged and the damages caused  
19 thereby.
- 20 6. At all times mentioned herein, the term "Defendants" includes SAVE MART, J.B.,  
21 FUNTASTIC and DOES 1-20.
- 22 7. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all  
23 times mentioned herein have conducted business within the State of California.
- 24 8. Upon information and belief, at all times relevant to this action, each of the Defendants,  
25 including DOES 1-20, was an agent, servant, or employee of each of the other  
26 Defendants. In conducting the activities alleged in this Complaint, each of the  
27 Defendants was acting within the course and scope of this agency, service, or  
28 employment, and was acting with the consent, permission, and authorization of each of

1 the other Defendants. All actions of each of the Defendants alleged in this Complaint  
2 were ratified and approved by every other Defendant or their officers or managing agents.  
3 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged  
4 wrongful conduct of each of the other Defendants.

5 9. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the  
6 Defendants was a person doing business within the meaning of Health and Safety Code  
7 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more  
8 employees at all relevant times.

9 **JURISDICTION**

10 10. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article  
11 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except  
12 those given by statute to other trial courts. This Court has jurisdiction over this action  
13 pursuant to Health and Safety Code section 25249.7, which allows enforcement of  
14 violations of Proposition 65 in any Court of competent jurisdiction.

15 11. This Court has jurisdiction over Defendants named herein because Defendants either  
16 reside or are located in this State or are foreign corporations authorized to do business in  
17 California, are registered with the California Secretary of State, or who do sufficient  
18 business in California, have sufficient minimum contacts with California, or otherwise  
19 intentionally avail themselves of the markets within California through their manufacture,  
20 distribution, promotion, marketing, or sale of their products within California to render  
21 the exercise of jurisdiction by the California courts permissible under traditional notions  
22 of fair play and substantial justice.

23 12. Venue is proper in the County of Los Angeles because one or more of the instances of  
24 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or  
25 because Defendants conducted, and continue to conduct, business in the County of Los  
26 Angeles with respect to the consumer product that is the subject of this action.

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1 BACKGROUND AND PRELIMINARY FACTS

2 13. In 1986, California voters approved an initiative to address growing concerns about  
3 exposure to toxic chemicals and declared their right "[t]o be informed about exposures to  
4 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,  
5 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking  
6 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections  
7 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources  
8 from contamination, to allow consumers to make informed choices about the products  
9 they buy, and to enable persons to protect themselves from toxic chemicals as they see  
10 fit.

11 14. Proposition 65 requires the Governor of California to publish a list of chemicals known to  
12 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*  
13 § 25249.8. The list, which the Governor updates at least once a year, contains over 700  
14 chemicals and chemical families. Proposition 65 imposes warning requirements and  
15 other controls that apply to Proposition 65-listed chemicals.

16 15. All businesses with ten (10) or more employees that operate or sell products in California  
17 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited  
18 from knowingly discharging Proposition 65-listed chemicals into sources of drinking  
19 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and  
20 reasonable" warnings before exposing a person, knowingly and intentionally, to a  
21 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

22 16. Proposition 65 provides that any person "violating or threatening to violate" the statute  
23 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.  
24 "Threaten to violate" means "to create a condition in which there is a substantial  
25 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).  
26 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,  
27 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).  
28

1 17. Plaintiff identified certain practices of manufacturers and distributors of Diethyl Hexyl  
2 Phthalate (“DEHP”) and Di-n-butyl Phthalate (“DBP”) of exposing, knowingly and  
3 intentionally, persons in California to the Proposition 65-listed chemicals of such  
4 products without first providing clear and reasonable warnings of such to the exposed  
5 persons prior to the time of exposure. Plaintiff later discerned that Defendants engaged  
6 in such practice.

7 18. On January 1, 1988, the Governor of California added DEHP to the list of chemicals  
8 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP  
9 to the list of chemicals known to the State to cause developmental male reproductive  
10 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)  
11 months after addition of DEHP to the list of chemicals known to the State to cause cancer  
12 and reproductive toxicity, DEHP became fully subject to Proposition 65 warning  
13 requirements and discharge prohibitions.

14 19. On December 2, 2005, the Governor of California added DBP to the list of chemicals  
15 known to the State to cause developmental, female, and male reproductive toxicity.  
16 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months  
17 after addition of DBP to the list of chemicals known to the State to cause reproductive  
18 toxicity, DBP became fully subject to Proposition 65 warning requirements and discharge  
19 prohibitions.

20 **SATISFACTION OF PRIOR NOTICE**

21 20. On or about February 9, 2014, Plaintiff gave notice of alleged violations of Health and  
22 Safety Code section 25249.6, concerning consumer products exposures, subject to a  
23 private action to SAVE MART, J.B., FUNTASTIC, and to the California Attorney  
24 General, County District Attorneys, and City Attorneys for each city containing a  
25 population of at least 750,000 people in whose jurisdictions the violations allegedly  
26 occurred, concerning the products TOY GUNS containing DEHP and DBP.

27 21. Before sending the notices of alleged violation, Plaintiff investigated the consumer  
28 products involved, the likelihood that such products would cause users to suffer

1 significant exposures to DEHP and DBP, and the corporate structure of each of the  
2 Defendants.

3 22. Plaintiff's notice of alleged violation included a Certificate of Merit executed by the  
4 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for  
5 Plaintiff who executed the certificate had consulted with at least one person with relevant  
6 and appropriate expertise who reviewed data regarding the exposures to DEHP and DBP,  
7 the subject Proposition 65-listed chemical of this action. Based on that information, the  
8 attorney for Plaintiff who executed the Certificate of Merit believed there was a  
9 reasonable and meritorious case for this private action. The attorney for Plaintiff attached  
10 to the Certificate of Merit served on the Attorney General the confidential factual  
11 information sufficient to establish the basis of the Certificate of Merit.

12 23. Plaintiff's notice of alleged violations also included a Certificate of Service and a  
13 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
14 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

15 24. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
16 gave notices of the alleged violations to SAVE MART, J.B., FUNTASTIC, and the  
17 public prosecutors referenced in Paragraph 20.

18 25. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
19 any applicable district attorney or city attorney has commenced and is diligently  
20 prosecuting an action against the Defendants.

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**FIRST CAUSE OF ACTION**

(By CONSUMER ADVOCACY GROUP, INC. and against SAVE MART, J.B., FUNTASTIC, and DOES 1-20 for Violations of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§ 25249.5, et seq.))

**Toy Guns**

26. Plaintiff CONSUMER ADVOCACY GROUP, INC. repeats and incorporates by reference paragraphs 1 through 25 of this complaint as though fully set forth herein.

27. Each of the Defendants is, and at all times mentioned herein was, a manufacturer, distributor, promoter, or retailer of TOY GUNS, which includes but is not limited to: (1) Clear dart gun with orange accents, Fun Guns™ with: 3 Darts & Targets, “SAFE-T-SHOT” “The World’s Safest Dart Gun!” ©Funtastic® Houston, Texas 77008 USA, Made in China, Item No. 4453, Bar Code: 0 46354 50500 6, “Uses only Fun Shots Darts” and (2) Funtastic *Classics*™ Class Dart Gun, “INCLUDES 4 DARTS!”, “NEAT TARGET UNDER GUN!”, ©Funtastic® Houston, Texas 77008 USA, Made in China, Item No. 8007, Bar Code: 0 46354 40400 2. (“TOY GUNS”)

28. TOY GUNS contain DEHP and DBP.

29. Defendants knew or should have known that DEHP and DBP have been identified by the State of California as chemicals known to cause cancer and reproductive toxicity and therefore are subject to Proposition 65 warning requirements. Defendants were also informed of the presence of DEHP and DBP in TOY GUNS within Plaintiff’s notice of alleged violations further discussed above at Paragraph 20.

30. Plaintiff’s allegations regarding TOY GUNS concern “[c]onsumer products exposure[s],” which “is an exposure that results from a person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service.” *Cal. Code Regs.* tit. 27, § 25602(b). TOY GUNS are consumer products, and, as mentioned herein, exposures to DEHP and DBP took place as a result of such normal and foreseeable consumption and use.

1 31. Plaintiff's allegations regarding TOY GUNS also concern Occupational Exposures,  
2 which "means an exposure to any employee in his or her employer's workplace." *Cal.*  
3 *Code Regs.* tit. 27, § 25602(f). Exposures of DEHP and DBP to Defendants' employees  
4 occurred through the course of their employment in their employers' workplaces.

5 32. Plaintiff is informed, believes, and thereon alleges that between February 9, 2011 and the  
6 present, each of the Defendants knowingly and intentionally exposed their employees and  
7 California consumers and users of TOY GUNS, which Defendants manufactured,  
8 distributed, or sold as mentioned above, to DEHP and DBP, without first providing any  
9 type of clear and reasonable warning of such to the exposed persons before the time of  
10 exposure. Defendants have distributed and sold DEHP and DBP in California.  
11 Defendants know and intend that California consumers will use and consume TOY  
12 GUNS, thereby exposing them to DEHP and DBP. Defendants thereby violated  
13 Proposition 65.

14 33. The principal routes of exposure are through dermal contact, ingestion and inhalation.  
15 Persons sustain exposures by handling TOY GUNS without wearing gloves or any other  
16 personal protective equipment, or by touching bare skin or mucous membranes with  
17 gloves after handling TOY GUNS, as well as through direct and indirect hand to mouth  
18 contact, hand to mucous membrane, or breathing in particulate matter dispersed from  
19 TOY GUNS. And as to Defendants' employees, employees may be exposed to DEHP and  
20 DBP in the course of their employment by handling, distributing, and selling TOY  
21 GUNS.

22 34. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of  
23 Proposition 65 as to TOY GUNS have been ongoing and continuous to the date of the  
24 signing of this complaint, as Defendants engaged and continue to engage in conduct  
25 which violates Health and Safety Code section 25249.6, including the manufacture,  
26 distribution, promotion, and sale of TOY GUNS, so that a separate and distinct violation  
27 of Proposition 65 occurred each and every time a person was exposed to DEHP and DBP  
28 by TOY GUNS as mentioned herein.

1 35. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65  
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the  
3 violations alleged herein will continue to occur into the future.

4 36. Based on the allegations herein, Defendants are liable for civil penalties of up to  
5 \$2,500.00 per day per individual exposure to DEHP and DBP from TOY GUNS,  
6 pursuant to Health and Safety Code section 25249.7(b).

7 37. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to  
8 filing this Complaint.

9 **PRAYER FOR RELIEF**

10 Plaintiff demands against each of the Defendants as follows:

- 11 1. A permanent injunction mandating Proposition 65-compliant warnings;
- 12 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
- 13 3. Costs of suit;
- 14 4. Reasonable attorney fees and costs; and
- 15 5. Any further relief that the court may deem just and equitable.

16  
17 Dated: May 30, 2014

YEROUSHALMI & YEROUSHALMI

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20 BY: \_\_\_\_\_

Reuben Yeroushalmi  
Attorneys for Plaintiff,  
Consumer Advocacy Group, Inc.